A

KERAJAAN MALAYSIA & ORS

v.

LAY KEE TEE & ORS

B

FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ (MALAYA)
NIK HASHIM FCJ
ZULKEFLI MAKINUDIN FCJ
[CIVIL APPEAL NO: 01-13-2007 (W)]

C

30 OCTOBER 2008

CIVIL PROCEDURE: *Action - Government proceedings - Action in tort against Federal and State Governments - Failure to state government officer responsible for alleged tortious act as defendant - Whether officer*

D

should be made party and his liability established before government could be made vicariously liable - Whether striking out of action proper - Government Proceedings Act 1956, ss. 5, 6 - Rules of the High Court 1980, O. 18 r. 19

E

CIVIL PROCEDURE: *Action - Limitation - Action in tort against Federal and State Governments - Whether action time-barred - Public Authorities Protection Act 1948, s. 2(a) - Civil Law Act 1956, ss. 7(3B),(5) - Prevention and Control of Infectious Diseases Act 1988, s. 4 - Animals Act 1953, ss. 36(8), 78*

F

TORT: *Vicarious liability - Liability of government - Failure to state government officer responsible for alleged tortious act as defendant - Whether officer should be made party and his liability established before government could be made vicariously liable*

G

TORT: *Breach of statutory duty - Spread of virus - Delay in taking action - Whether actionable - Whether action for breach of statutory duties frivolous and misconceived*

In this appeal, the appellants were the Government of Malaysia and the State Governments of Negeri Sembilan, Perak and

H

Selangor. The respondents were 184 respondents who allegedly suffered from the Japanese Encaphalities (JE)/Nipah virus or were dependants of persons who died from the virus or owners of pig farms affected by the virus. The affected respondents requested

I

the appellants to cull the pigs to contain the spread of the virus and subsequently brought an action against the appellants, amongst others, for negligence on the ground that the appellants

did not act fast enough to control the spread of the virus. As a result thereof, the respondents claimed that the appellants allowed or permitted the situation to worsen to such an extent that it led them (the respondents) to suffer injury. The senior assistant registrar ('SAR') struck out the respondent's action pursuant to O. 18 r. 19(1)(a), (b), (c) and (d) of the Rules of the High Court 1980 and the High Court affirmed the SAR's decision. When the respondents appealed to the Court of Appeal against the High Court decision, the appeal was allowed with no order as to costs. Hence, the appellants' appeal herein against the decision of the Court of Appeal.

Held (allowing the appeal)
Per Nik Hashim FCJ delivering the judgment of the court:

(1) In any claim in tort against the government, the government officer who was responsible for the alleged tortious act must be made a party and his liability must be established before the government could be made vicariously liable as principal (ss. 5, 6 of the Government Proceedings Act 1956 ('GP')). It would be insufficient to merely identify the officer without joining the officer as a party because liability by evidence needed to be established. It was only upon a successful claim against the officer personally could a claim be made against the government. (para 16)

(2) All eight causes of actions brought in the present case were actions in tort or tort-based premised on the act or omission of an individual. None of the governments sued was capable of committing the wrong pleaded. Since the governments' liability in tort could only be vicarious by virtue of ss. 5 and 6 GP and as the officers who were responsible for the alleged wrongdoing were not joined as defendants to the action, it was therefore not possible in law to maintain a successful claim in tort against the governments as primary tortfeasors. That being so, the appellants' application to strike out the respondent's action was meritorious. (para 17)

(3) This was not a case of joining wrong parties but bringing an action against the wrong parties. The four appellants were the sole parties herein and if the action was dismissed against them, there were no other parties against whom the case could proceed. (para 18)

(4) The respondent's pleadings revealed that the claim was not one of continuous tort but related to specific acts or omissions. All the relevant events happened earlier than 1 March 1999 when the virus was isolated. The decisions made on 18 March 1999 and 19 March 1999 to cull the pigs were actually not challenged. Therefore, since the suit was filed on 20 March 2002, the action was clearly time-barred as it was filed out of time. (para 22)

(5) The Court of Appeal was incorrect when it interpreted the issue of limitation of time as barring the remedy but not the right to sue. In so far as the Public Authorities Protection Act 1948 ('PAPA') was concerned, the law was settled. The limitation under PAPA was "just as much a 'right' as any other statutory or contractual protection against a future suit." (as held by the Privy Council in *Yew Bon Tew & Anor v. Kenderaan Bas Mara*). Both the Court of Appeal and the Federal Court had consistently struck out claims when it was clear that the statute of limitations would be relied on or raised. In the present case, it was clear that the appellants were going to rely on limitation and there was no way that the respondents could have escaped from it. A defendant in an application to strike out pleadings and indorsements under O. 18 r. 19(1) RHC is entitled to raise limitation of action without pleading a defence and filing it to that effect. Similarly, herein, the appellants were entitled to do the same, and since the respondent's action was clearly statute-barred, the action was properly struck out. (paras 23, 24 & 26)

(6) In the High Court the respondents conceded that s. 7(5) and (3B) of the Civil Law Act 1956 ('CLA') applied against five of the respondents. Despite that, the respondents still wanted the court to convert the claims from dependency to estate claims. Clearly that was not proper as such actions were further prohibited by principles concerning capacity and the right to sue. (para 27)

(7) The Court of Appeal had only considered the issue of limitation under the PAPA whereas the Prevention and Control of Infectious Diseases Act 1988 (the 'PCIDA'), the CLA and the Animals Act 1953 (the 'AA') were not considered at all. That was despite the fact that the appellants relied on them as part of the ground to strike out the

respondents' action. That being the case, the Court of Appeal had erred in its decision in not holding the claims were barred not only under s. 2(a) PAPA but also under the specific laws of s. 4 PCIDA, s. 7(5) and (3B) CLA and ss. 36(8) and 78 AA. (para 28)

(8) The appellants' claim that there was a failure or omission to use statutory duties imposed under the PCIDA was incorrect. The PCIDA did not impose any such duties on the appellants but instead imposed on certain members of the public to do certain acts (see ss. 10, 12 13 and 17 PCIDA). None of its provisions imposed an obligation on the appellants. The appellant's legal duty must be imposed by statute or under the common law. Since there was none under either, the action for breach of statutory duties was clearly frivolous and misconceived and must therefore be struck out. It followed that the provisions under PCIDA and AA offered absolute protection to the appellants against the respondent's claim, especially since the orders made by the respective Chief Ministers were not challenged. Even without the above statutory protections, the law was quite clear that the respondent's claim was unsustainable and therefore must be struck out *in limine*. (paras 31, 32 & 33)

(9) The losses claimed in the present action were occasioned by the JE or Nipah virus. The appellants did not cause the loss. But it was alleged by the respondents that the losses suffered by them was caused by the delay on the part of the appellants in taking the necessary measures or due to the inefficiency of the appellants. Delay in taking action or the exercise of any power is not actionable as the losses would have occurred in any event. (paras 34 & 35)

Bahasa Malaysia *Translation Of Headnotes*

Perayu-perayu dalam rayuan di sini adalah Kerajaan Malaysia dan Kerajaan-kerajaan Negeri Negeri Sembilan, Perak dan Selangor. Responden-responden pula adalah 184 orang yang mendakwa mengalami penderitaan akibat dari virus Nipah/Japanese Encaphalities (JE) atau waris-waris mereka yang telah meninggal dunia akibat virus tersebut atau pemilik-pemilik ladang babi yang terjejas oleh virus yang sama. Responden-responden telah meminta perayu-perayu supaya membunuh babi-babi bagi mengawal penyebaran virus, tetapi kemudiannya memfail tuntutan terhadap

perayu-perayu antara lain atas alasan perayu-perayu cuai dan gagal bertindak dengan cepat untuk mengawal virus dari tersebar. Menurut responden-responden, perayu-perayu telah membiarkan keadaan menjadi gawat sekaligus menyebabkan mereka menanggung kerugian. Penolong Kanan Pendaftar ('PKP') telah membatalkan tuntutan responden-responden di bawah A. 18 k. 19(1)(a), (b), (c) (d) Kaedah-kaedah Mahkamah Tinggi 1980 dan keputusan tersebut telah disahkan oleh Mahkamah Tinggi. Responden-responden merayu ke Mahkamah Rayuan di mana rayuan dibenarkan tanpa apa-apa perintah mengenai kos. Ini adalah rayuan perayu-perayu terhadap keputusan Mahkamah Rayuan tersebut.

Diputuskan (membenarkan rayuan)

Oleh Nik Hashim HMP menyampaikan penghakiman mahkamah:

(1) Dalam mana-mana tuntutan tort terhadap kerajaan, pegawai kerajaan yang bertanggungjawab atas perbuatan tort yang didakwa itu hendaklah dijadikan satu pihak dan liabilitinya hendaklah dibuktikan terlebih dahulu sebelum kerajaan boleh didapati menanggung liabiliti vikarius sebagai prinsipal (ss. 5, 6 Akta Prosiding Kerajaan 1956 ('GP')). Adalah tidak memadai untuk hanya mengenal pasti pegawai tersebut tanpa menjadikannya sebagai satu pihak kerana liabiliti perlu dibuktikan melalui keterangan. Hanyalah setelah tuntutan terhadap pegawai tersebut secara peribadi telah dibuktikan, tuntutan terhadap kerajaan boleh dibuat.

(2) Kesemua lapan kausa tindakan yang dibawa di dalam kes semasa adalah tindakan dalam tort atau berasaskan tort dan berlandas kepada perbuatan atau peninggalan yang dilakukan oleh seseorang individu. Tiada satu pun dari kerajaan-kerajaan yang didakwa mempunyai kemampuan untuk melakukan kesalahan yang diplidkan. Oleh kerana liabiliti kerajaan di dalam tort hanya berbentuk vikarius berdasarkan ss. 5 dan 6 GP dan oleh kerana pegawai-pegawai yang bertanggungjawab atas kesalahan yang didakwa itu tidak dijadikan pihak kepada tindakan, maka tidaklah mungkin suatu tindakan tort yang berjaya di sisi undang-undang boleh dihadapkan kepada kerajaan selaku tortfeasor utama. Mengambilkira semua ini, permohonan perayu-perayu untuk membatalkan tindakan responden-responden adalah bermerit.

(3) Ini bukan suatu kes salah mencantum pihak tetapi satu kes membawa tindakan terhadap pihak yang salah. Keempat-empat perayu merupakan satu-satunya pihak di sini dan jika tindakan terhadap mereka ditolak, maka tiada lagi pihak lain terhadap mana kes boleh dilangsungkan.

(4) Pliding responden-responden menunjukkan bahawa tuntutan bukanlah satu tuntutan tort yang berterusan tetapi tort yang berhubung dengan tindakan atau peninggalan-peninggalan tertentu. Kesemua peristiwa yang relevan berlaku sebelum 1 Mac 1999 bilamana virus telah dihapuskan. Keputusan yang dibuat pada 18 Mac 1999 dan 19 Mac 1999 untuk membunuh babi-babi sebenarnya tidak dicabar. Oleh itu, oleh kerana guaman difailkan pada 20 Mac 2002, tindakan jelas difail di luar masa dan terhalang oleh had masa.

(5) Mahkamah Rayuan khilaf apabila mentafsir isu had masa sebagai menghalang remedi tetapi tidak hak untuk mendakwa. Setakat yang berkaitan dengan Akta Perlindungan Pihak Berkuasa Awam 1948 ('PAPA'), undang-undangnya sudah pun mantap. Had masa di bawah PAPA adalah "just as much a 'right' as any other statutory or contractual protection against a future suit." (sepertimana diputuskan oleh Majlis Privi di dalam *Yew Bon Tew & Anor v. Kenderaan Bas Mara*). Kedua-dua Mahkamah Rayuan dan Mahkamah Persekutuan secara konsisten telah membatalkan tuntutan-tuntutan apabila ianya jelas bahawa statut had masa akan dijadikan pergantungan atau dibangkitkan. Dalam kes semasa, adalah jelas bahawa perayu-perayu akan bergantung kepada had masa dan tidak ada cara bagaimana responden-responden boleh terlepas darinya. Seseorang defendan atas suatu permohonan untuk membatalkan pliding dan indorsemen di bawah A. 18 r. 19(1) KMT berhak untuk membangkitkan had masa tindakan tanpa perlu memplidkan pembelaan dan memfailkannya. Begitu jugalah, dalam kes ini, perayu-perayu berhak untuk berbuat serupa itu, dan memandangkan tindakan responden-responden jelas dihalang oleh statut, ia telah dibatalkan dengan wajarnya.

(6) Di Mahkamah Tinggi, responden-responden mengakui bahawa s. 7(5) dan (3B) Akta Undang-Undang Sivil 1956 ('CLA') terpakai terhadap 5 responden-responden. Walaupun begitu, responden-responden masih mengkehendaki mahkamah untuk menukarkan tuntutan dari tuntutan dependency kepada

tuntutan pusaka. Itu jelas tidak wajar disebabkan tindakan sebegitu dihalang oleh prinsip-prinsip berkaitan kapasiti dan hak untuk mendakwa.

(7) Mahkamah Rayuan hanya menimbang isu had masa di bawah PAPA sedangkan Akta Pencegahan dan Pengawalan Penyakit Berjangkit 1988 ('PCIDA'), CLA dan Akta Binatang 1953 ('AA') langsung tidak dipertimbang. Pertimbangan tidak dibuat walaupun perayu-perayu telah bergantung kepada Akta-Akta tersebut sebagai sebahagian dari alasan mereka untuk membatalkan tindakan responden-responden. Dalam keadaan sedemikian, Mahkamah Rayuan khilaf dalam keputusannya apabila tidak merumuskan bahawa tindakan telah dihalang oleh had masa, bukan sahaja di bawah s. 2(a) PAPA tetapi juga di bawah undang-undang spesifik s. 4 PCIDA, s. 7(5) & (3B) CLA dan ss. 36(8) & 78 AA.

(8) Dakwaan responden-responden bahawa terdapat kegagalan atau peninggalan untuk melaksanakan tanggungjawab statutori yang dituntut di bawah PCIDA adalah tidak benar. PCIDA tidak mengenakan sebarang tanggungjawab ke atas perayu-perayu, sebaliknya meletakkan kewajipan ke atas sebahagian orang awam untuk melakukan tindakan-tindakan tertentu (lihat ss. 10, 12 13 dan 17 PCIDA). Tiada satu pun dari peruntukannya yang mengenakan apa-apa obligasi terhadap perayu-perayu. Tanggungjawab undang-undang perayu-perayu semestinyalah setakat yang diletak ke atasnya oleh statut atau di bawah undang-undang common. Oleh kerana tanggungjawab sedemikian tidak wujud, maka tuntutan kerana pelanggaran kewajipan statutori di sini adalah remeh dan tersasul dan kerana itu harus dibatalkan. Ianya mengikut bahawa peruntukan-peruntukan di bawah PCIDA dan AA telah memberikan perlindungan mutlak kepada perayu-perayu terhadap tuntutan responden-responden, terutama bilamana perintah-perintah seperti yang dibuat oleh Ketua Menteri telah tidak dicabar. Jikapun tanpa perlindungan-perlindungan statutori tersebut, undang-undangnya jelas bahawa tuntutan responden-responden adalah tidak boleh dipertahankan dan kerana itu harus dibatalkan *in limine*.

(9) Kerugian yang dituntut di dalam tindakan di sini terbit dari JE atau virus Nipah. Ia tidak berpunca dari perayu-perayu. Namun, responden-responden mengatakan bahawa kerugian yang dideritai mereka adalah disebabkan oleh kelengahan perayu-perayu mengambil langkah-langkah perlu atau kerana ketidakcekapan perayu-perayu. Kelengahan dalam mengambil tindakan atau dalam melaksanakan mana-mana kuasa tidak boleh menjadi asas tindakan kerana dalam keadaan apapun kerugian tetap akan berlaku juga.

Case(s) referred to:

Alias Ismail v. Hairuddin Mohamad & Anor [1997] 4 CLJ 669 CA ***(refd)***
Arthur J S Hall v. Simons [2000] 3 All ER 673 ***(refd)***
Attorney General v. Hartwell [2004] UKPC 12 ***(refd)***
Capital and Counties plc v. Hampshire County Council & Ors [1997] 2 All ER 865 ***(refd)***
E v. K [1995] 2 NZLR 239 ***(refd)***
East Suffolk Rivers Catchment Board v. Kent [1941] AC 74 ***(refd)***
Gorringe v. Calderdate Metropolitan Borough Council [2004] 2 All ER 326 ***(refd)***
Hj Abdul Rahman v. Government of Malaysia & Anor [1966] 1 LNS 60 ***(refd)***
Hj Hussin Hj Ali & Ors v. Datuk Hj Mohamed Yaacob & Ors and Connected Cases [1983] 2 CLJ 68; [1983] CLJ (Rep) 165 FC ***(refd)***
Lai Seng & Co v. Government of Malaysia & Ors [1973] 1 LNS 70 ***(refd)***
Steven Phoa Cheng Loon & Ors v. Highland Properties Sdn Bhd & Ors [2000] 4 CLJ 508 HC ***(refd)***
Stovin v. Wise [1996] AC 923 ***(refd)***
The Administration of the Territory of Papua and New Guinea v. Leahy [1960-1961] 105 CLR 6 ***(refd)***
X & Ors (minors) v. Bedfordshire County Council & Other Appeals [1995] 3 All ER 353 ***(refd)***
Yew Bon Tew & Anor v. Kenderaan Bas Mara [1983] 1 CLJ 11; [1983] CLJ (Rep) 56 PC ***(refd)***

Legislation referred to:

Animals Act 1953, ss. 36(8), 78
Civil Law Act 1956, s. 7(3B), 7(5)
Government Proceedings Act, ss. 4, 5, 6
Prevention and Control of Infectious Diseases Act 1988, ss. 4(1), 10(2), 11, 12, 13, 14, 15, 16, 17
Public Authorities Protection Act 1948, s. 2(a)
Rules of the High Court 1980, O. 15 r. 6(1), O. 18 r. 19(1)(a), (b), (c), (d)
Rules of the Supreme Court 1957, O. 16 r. 11

For the appellants - Dato' Mary Lim Thiam Suan (Amarjeet Singh SFC with her)

For the respondents - Malik Imtiaz Sarwan (Ser Choon Ing, Neoh Hor Kee & Sivarasa Rasiah with him); M/s Ser & Co

[Appeal from Court of Appeal; Civil Appeal No: W-01-12-04]

[Editor's note: For the High Court judgment, please see Lay Kee Tee & Yang Lain lwn. Kerajaan Malaysia & Yang Lain [2004] 8 CLJ 832.]

Reported by Usha Thiagarajah

JUDGMENT

Nik Hashim FCJ:

Factual Background

[1] The Government of Malaysia and the Governments of the States of Negeri Sembilan, Perak and Selangor appeal to the this court against the decision of the Court of Appeal (Gopal Sri Ram JCA, Richard Malanjum JCA (now CJ (Sabah & Sarawak), Hashim Yusoff JCA (now FCJ)) given on 6 April 2005, whereby the Court of Appeal allowed the respondents' appeal with no order as to costs against the decision of the High Court (Azmel Maamor J (later FCJ)) which affirmed the senior assistant registrar's (the SAR's) decision in striking out the respondents' writ of summons and statement of claim pursuant to O. 18 r. 19(1)(a), (b), (c), (d) of the Rules of the High Court 1980 (the RHC).

[2] Briefly, the facts are that the 184 respondents either are themselves persons who allegedly had suffered from the Japanese Encaphalities (JE)/Nipah virus or are dependants of persons who died from JE/Nipah virus or owners of pigs farms affected by the JE/Nipah virus. Alarmed by the virus, the affected respondents had requested the Federal and the respective State Governments to cull the pigs to contain the virus spreading. The respondents' complaint was that the Federal and the respective State Governments did not act fast enough but allowed or permitted the situation to worsen to such an extent that led to the respondents suffering injury.

[3] In the 145 paragraphed statement of claim, the respondents narrated at length the events and these details cover some 48 pages. The causes of actions are as follows: negligence, breach of fiduciary duties, breach of statutory duties, negligent misstatement,

fraud, unlawful deprivation of fundamental rights, misfeasance of public office and trespass to land, buildings and goods. They claimed for general damages, special damages consisting of RM73,412,750 for loss of pigs, RM60,826,097 for damages to farm facilities, RM1,190,000 for medical expenses and RM185,000 for funeral expenses; exemplary and aggravated damages, certain declaratory orders, interest and costs.

[4] Against the claim, the appellants filed an application to strike out the action under O. 18 r. 19(1)(a), (b), (c), (d) of the RHC on the following grounds:

(i) wrong or unnecessary parties have been sued;

(ii) no reasonable cause of action;

(iii) the claims were barred under:

(a) section 2(a) of the Public Authorities Protection Act 1948 (the PAPA);

(b) section 7(5) and (3B) of the Civil Law Act 1956 (the CLA);

(c) sections 36 and 78 of the Animals Act 1953 (the AA);

(d) section 4 of the Prevention and Control of Infectious Diseases Act 1988 (the PCIDA).

(iv) the claims were unsustainable under ss. 10-17 of the PCIDA; and

(v) the statement of claim is prolix, raises no triable issue, is made up of submissions and evidence, prevents a fair trial and is an abuse of the court process.

[5] The appellants' application for the striking out was allowed by the SAR and affirmed by the learned High Court judge. Although the above grounds were relied on, the learned High Court judge ruled that the first ground concerning non-suing of the primary tortfeasors was sufficient to dismiss the appeal. Amongst other things, he said:

> Pada saya, sebelum seseorang pegawai kerajaan itu bertanggungan untuk sebarang kesalahan tort atau ketinggalan yang dilakukan, isu liabiliti pegawai berkenaan perlu diputuskan melalui perbicaraan di Mahkamah Terbuka. Jika, pegawai kerajaan terbabit didapati bertanggungan, maka majikan mereka iaitu pihak Kerajaan yang

merupakan principal mereka akan bertanggungan secara vikarius. Jika pegawai kerajaan yang berkenaan tidak dinamakan sebagai Defendan bagaimana mereka boleh membela diri untuk menafikan tuduhan-tuduhan yang dilemparkan kepada mereka. Amatlah tidak adil dan tidak juga munasabah untuk memutuskan seseorang pegawai kerajaan itu bertanggungan tanpa memberi mereka peluang untuk membela tuduhan yang dibawa terhadap mereka. Untuk tujuan itu, pada penghakiman saya, pegawai kerajaan terbabit perlu dinamakan sebagai suatu pihak supaya liabiliti mereka dapat ditentukan dan jika mereka bertanggungan maka majikan mereka bertanggungan secara vikarius. Keperluan ini jelas dikehendaki mengikut s. 6(1) Akta 359 ...

The above judgment was reported in [2004] 8 CLJ 382.

[6] However, the Court of Appeal did not find favour with the decision of the learned High Court judge and allowed the appeal. In delivering the judgment of the court dated 13 May 2005, Gopal Sri Ram JCA ruled that there were triable issues in the case and ordered it to be tried and disposed of speedily. The following are some of the gists of the relevant findings made by the Court of Appeal:

(i) the application of O. 15 r. 6 of the RHC.

(ii) the tortfeasors who were the relevant officers of the appellants need not be cited and sued as defendants under ss. 4, 5 and 6 of the Government Proceedings Act (Act 359).

(iii) the appellants could be named and sued directly as primary tortfeasors under ss. 4, 5 and 6 of Act 359.

(iv) the case of *Haji Abdul Rahman v. Government of Malaysia & Anor* [1966] 1 LNS 60 was wrongly decided and should no longer be followed. And the case of *Lai Seng & Co. v. Government of Malaysia & Ors.* [1973] 1 LNS 70 was followed.

(v) the decision in *Attorney General v. Hartwell* [2004] UKPC 12 applied to impose original liability on the appellants.

(vi) the defence of limitation is a defence which must be put down in writing as part of a pleaded case.

Questions Of Law

[7] On 25 June 2007 this Court granted the appellants leave to appeal against the decision of the Court of Appeal on the following questions:

(1) Whether ss. 4, 5 and 6 of Act 359 require the public officers or employees of the appellants, who are the alleged tortfeasors concerned must be named and be sued in a claim? A

(2) Whether by virtue of ss. 4, 5 and 6 of Act 359 the appellants being governments, can personally commit torts, to wit: negligence; breach of fiduciary duties; breach of statutory duties; negligent misstatement; fraud; breach of constitutional rights; misfeasance of public office and trespass to land and property? B

(3) Whether the action of the appellants in applying to strike out the writ and statement of claim which is barred by s. 4 of the PCI DA; s. 78 of the AA; s. 2(a) of the PAPA; s. 7(5) and (3B) of the CLA is fit and proper? C

(4) Whether the appellants can be named and be sued directly and as primary tortfeasors by virtue of ss. 4, 5 and 6 of Act 359. D

(5) Whether the issue of limitation must be pleaded in a defence and not raised as a ground for striking out an action pursuant to O. 18 r. 19(1) of the RHC. E

[8] With regard to the questions, I would answer them in the order of Questions (1), (2) and (4) taken together and follow by Questions (3) and (5) taken together as proposed by the appellants for the reason that the questions are interrelated. F

Questions (1), (2) And (4)

[9] Concerning the questions posed, learned senior federal counsel for the appellants argued that the Court of Appeal was erroneous in its decision, in particular: G

(a) in the interpretation of ss. 4, 5 and 6 of Act 359 and its reliance on *Lai Seng & Co* in the interpretation and in treating the decision in *Haji Abdul Rahman, supra,* as wrongly decided; and H

(b) In the application of O. 15 r. 6 of the RHC to the present case.

[10] Learned counsel for the respondents, on the other hand, in support of the judgment of the Court of Appeal, submitted that the appellants were not impleaded as primary tortfeasors. The I

identity of the wrongdoer is a matter that merely goes to the burden of proof on a claimant to establish the wrongdoing at a trial. Further, the language of ss. 4, 5 and 6 of Act 359 being clear and unambiguous, there is no basis in law to imply into the provisions a requirement in law for the specific officers concerned to be joined as a defendant. To read the provision in that way would be to limit its application in a way not intended by legislature and cited *Lai Seng & Co* in which Chang Min Tat (later FJ) ruled that though the wrongdoer was a proper defendant, the person liable for the acts of the wrongdoer was also a proper defendant on the basis that s. 6 did not lay down any strict rule of practice in proceedings against the Government. In any event, a failure to join parties cannot in itself be made a basis for a striking out in light of the clear expression of O. 15 r. 6(1) of the RHC which the Court of Appeal had applied to support its decision.

[11] In my view, the above questions concern the construction of ss. 4, 5 and 6 of Act 359. For ease of reference, I would now reproduce their provisions which are as follows:

Claims enforceable by proceedings against Government

Section 4: Subject to this Act and of any written law, any claim against the Government which:

(a) is founded on the use or occupation or the right to the use or occupation of State land; or

(b) arises out of the revenue laws; or

(c) arises out of any contract made by the authority of the Government which would, if such claim had arisen between subject and subject, afford ground for civil proceedings; or

(d) is a claim (other than a claim in tort) for damages or compensation not included in the proceeding paragraphs which might lawfully be enforced by civil proceedings as between subject and subject,

shall be enforceable by proceedings against the Government for that purpose in accordance with this Act.

Liability of the Government in tort

Section 5: Subject to this Act, the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government.

Limits of liability of the Government

Section 6(1) No proceedings shall lie against the Government by virtue of section 5 in respect of any act, neglect or default of any public officer, unless proceedings for damages in respect of such act, neglect or default would have lain against such officer personally.

(2) Any written law which negatives or limits the amount of the liability of any public officer in respect of any act, neglect or default committed by that officer shall, in the case of proceedings against the Government under section 5 in respect of such act, neglect or default of such officer, apply in relation to the Government as it would have applied in relation to such officer if the proceedings against the Government had been proceedings against such officer.

(3) ...

(4) ...

(5) ...

[12] It is worthy of note that Act 359 was enacted in 1956 to amend and consolidate all laws relating to proceedings against the Federal and State Governments. This law contains substantive provisions creating rights to directly sue the Government and in case of tort to sue the Government vicariously. Section 4 of Act 359 prescribes that proceedings may be directly brought against the Government if the claim is one relating to use or occupation or right to use or occupation of land; revenue matters, contractual; claims (other than tort) for damages or compensation lawfully enforced by civil proceedings as between subject and subject; whereas ss. 5 and 6 provide for liability of the Government in tort. Thus, the case of *Attorney General v. Hartwell,*

supra, which imposed original liability for negligence against the Government of the British Virgin Islands in permitting PC Laurent to have access to a police firearm, is not quite relevant to our case as that case discussed the common law position which is not applicable in view of Act 359.

[13] In *Haji Abdul Rahman, supra,* the plaintiff brought an action to recover damages arising out of a traffic accident in which an unlighted steam roller belonging to the Government had been left parked on the road at night. The deceased motorcyclist had crashed into it. One of the points taken by the defendant Government was that the action against the Government as principal was bad in law because the servant of the Government was not joined as a defendant to the action. Abdul Aziz J (later FJ) after stating ss. 5 and 6 of Act 359 in his grounds of judgment concluded by saying, "the identity of the officer must be ascertained and the liability of the officer must be established before the Government can be made liable".

[14] However, the Court of Appeal did not agree with the High Court and preferred the decision of Chang Min Tat J (later FJ) in *Lai Seng & Co, supra.* That case concerned a dispute over duties payable depending on the applicable taxing code to the plaintiff's goods. The defendants were the Government of Malaysia, Comptroller-General of Customs & Excise and Assistant-Comptroller of Customs & Excise, Penang and Butterworth. After filing a defence, senior federal counsel filed an application to set aside the entire proceedings contending that the identity of the officer who applied taxing code must be ascertained. The learned judge though agreeing that the tortfeasor should be made a party took the view that the presence of the Government was sufficient. He relied on the O. 16 r. 11 of the Rules of the Supreme Court 1957 (which is equivalent to O. 15 r. 6(1) of the RHC) to prevent a defeat of an action by reason of misjoinder or nonjoinder of parties. He said:

> ... It is correct, I concede, that in action for tort, the proper defendant is the wrong-doer but the person who is liable for the acts of the wrong-doer or to whom the liability for the injury has passed is also a proper defendant, and for myself, I would adopt the attitude of Viscount Simon,
>
> > the courts before whom such a case as this comes have to decide it as between the parties before them.

In *Adams v. Naylor* ([1946] AC 543, 550) which is a case for damages for negligence but which must now be read subject to the qualification that since then the Crown Proceedings Act 1947 has come into force.

[15] It must be pointed out that the cases of *Haji Abdul Rahman* and *Lai Seng & Co, supra,* are easily distinguishable. In *Lai Seng & Co* the case was indeed properly brought against the Government because the claim arose out of the revenue laws. Section 4 of Act 359 clearly allows such claim to be directly brought against the Government. However, in *Haji Abdul Rahman,* the action was one based in tort to which ss. 4 and 5 of Act 359 apply. See *Steven Phoa Cheng Loon & Ors. v. Highland Properties Sdn Bhd & Ors.* [2000] 4 CLJ 508 where the same issue was successfully raised and not disturbed by the appellate courts.

[16] Thus, I entirely agree with the views expressed by Abdul Aziz J (later FJ) in *Haji Abdul Rahman, supra.* Contrary to the finding of the Court of Appeal, *Haji Abdul Rahman* was correctly decided and should be upheld. Therefore, on the proper construction of ss. 5 and 6 of Act 359, in any claim in tort against the Government, the officer of the Government who was responsible for the alleged tortious act must be made a party and his liability be established before the Government can be made liable vicariously as principal. It would be insufficient to merely identify the officer without joining the officer as a party because liability by evidence needs to be established. It is only upon a successful claim against the officer personally can a claim be laid against the Government.

[17] In the present case, all the eight causes of actions are actions in tort or tort-based premised on the act or omission of an individual. None of the Governments sued is capable of committing the wrong pleaded. Since the Governments' liability in tort can only be vicarious by virtue of ss. 5 and 6 of Act 359, and as the officers who were responsible for the alleged wrongdoing were not joined as defendants to the action, it is therefore not possible in law to maintain a successful claim in tort against the Governments as primary tortfeasors. That being so, the appellants' application to strike out the respondents' actions is meritorious.

[18] However, that is not the end of the matter. The Court of Appeal applied O. 15 r. 6(1) of the RHC not to defeat the respondents' action for the misjoinder or nonjoinder of parties as applied in *Lai Seng & Co*. In this respect, I agree with the appellants that this is not just a case of joining wrong parties but bringing an action against the wrong parties. The four appellants are the sole parties here and if the action is dismissed against them there are no other parties against whom the case can proceed.

[19] Thus, my answer to Question (1) is in the positive while Questions (2) and (4) are in the negative.

Questions (3) And (5)

[20] These two questions arose as a result of the finding of the Court of Appeal which ruled that the defence of limitation is a defence which must be put down in writing as part of a pleaded case. The court then proceeded to discuss the matter in the context of continuing injury concluding that whether the case is in fact one of continuing injury is one for trial.

[21] To lend support of the above finding, the respondents submitted that it is not appropriate to strike out the claim for limitation of time as it is not blatant that the respondents are impeded by a time bar. The causes of actions are based on a continuum of acts and omissions of the appellants that span the period from September 1998 to May 1999. And since the writ was filed on 20 March 2002 the claim was well within the three year period as provided for under s. 2(a) of the PAPA. As such, learned counsel for the respondents urged the court not to shut out the respondents from pursuing their claims and asked the appellants to file their defence forthwith.

[22] With respect, I do not agree. I agree with the appellants that the respondents' pleadings reveal that the claim is not one of continuous tort but relates to specific acts or omissions, namely: failing to take steps to determine the cause of the outbreak of the virus; acting on erroneous assumptions; failing to give consideration to virologist, Jane Cardoza; failing to refer or send samples to the right experts for examination; implementing unsuitable measures to manage and control the virus (see paras 88, 90, 96, 97, 124.3 and 124.13 of the statement of claim). All these events happened earlier than 1 March 1999 when the virus was isolated. The decisions made on 18 March 1999 and 19 March 1999 to cull

the pigs were actually not challenged. Therefore, since the suit was filed on 20 March 2002, the action was clearly time barred as it was filed out of time.

[23] Regarding the issue of limitation of time, the Court of Appeal appears to interpret it as barring remedy but not the right to sue. That is not correct. In so far as PAPA is concerned, the law is settled. The Privy Council in *Yew Bon Tew & Anor v. Kenderaan Bas Mara* [1983] 1 CLJ 11; [1983] CLJ (Rep) 56 held that limitation under PAPA is "just as much a "right" as any other statutory or contractual protection against a future suit".

[24] In this respect, both the Court of Appeal and the Federal Court have consistently struck out claims when it was clear that the statute of limitations would be relied on or raised. In *Alias Ismail v. Hairuddin bin Mohamad & Anor* [1997] 4 CLJ 669 the Court of Appeal held that the court has no discretion to set aside a defence of limitation. It was open to the defendant on an application to dismiss an action as being frivolous and vexatious or an abuse of the process of the court to show the plaintiff's cause of action was statute-barred and must fail for that reason.

[25] In *Hj Hussin Hj Ali & Ors v. Datuk Hj Mohamed Yaacob & Ors & Other Cases* [1983] 2 CLJ 68; [1983] CLJ (Rep) 165, the appellants there filed suits against the Menteri Besar, the State Secretary and the Government of Kelantan alleging that their dismissal as penghulus was unconstitutional and unlawful. The respondents did not file a defence but applied for the writ to be struck out on the grounds that it disclosed no reasonable causes of action, was frivolous, vexatious, irregular, null and void and that it was otherwise an abuse of the court process. It was averred that the actions were filed too late as they were statute-barred by the PAPA. The writs were struck out by the High Court. On appeal, learned counsel for the appellants argued that the defence of limitations had to be pleaded. The Federal Court in dismissing the appeal and affirming the striking out order, said:

> We need not go further than to refer to the judgment of this Court in *Tio Chee Hing & Ors v. Government of Sabah* [1980] 1 LNS 124 where this court referred to the Court of Appeal decision in *Riches v. Director of Public Prosectutions* [1973] 2 All ER 935, 939 which decided that where it is clear that the defendant was going to rely on the statute of limitations and there was nothing before the court to suggest that the plaintiffs could escape from it, the claim would be struck out. An extract from the judgment of Davis LJ at page 939 is relevant:

> In the light of those more recent authorities I think, as I say, that perhaps the observations of this court in *Dismore v. Milton* went too far. I do not want to state definitely that, in a case where it is merely alleged that the Statement of Claim discloses no cause of action, the limitation objection should or would prevail. In principle, I cannot see why not. If there is any room for an escape from the statute, well and good; it can be shown. But in the absence of that, it is difficult to see why a defendant should be called on to pay large sums of money and a plaintiff be permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which has already been barred by the statute of limitations and must fail.

[26] Likewise, in the present action, it was clear that the appellants were going to rely on limitation and there was no way that the respondents could have escaped from it. Thus, a defendant on an application to strike out pleadings and indorsements under O. 18 r. 19(1) of the RHC is entitled to raise limitation of action without pleading a defence and filing it to that effect. Similarly, in the present case, the appellants were entitled to do the same, and since the respondents' action was clearly statute-barred, the action was therefore properly struck out.

[27] Besides, there is also another matter under s. 7(5) and 7(3B) of the CLA which needs to be clarified. In the High Court the respondents had conceded that this section applied against five of the respondents. Despite this, the respondents still anted the court to convert the claims from dependency to estate claims. Clearly this is not proper as such actions are further prohibited by principles concerning capacity and the right to sue.

[28] In the instant case, it is to be noted that the Court of Appeal had considered only on the issue of limitation under the PAPA whereas the PCI DA, the CLA and the AA were not considered at all, though they were relied on by the appellants as parts of the grounds to strike out the respondents' action. That being the case, the Court of Appeal had erred in its decision in not holding the claims were barred not only under s. 2(a) of the PAPA, but also under the specific laws of s. 4 of the PCI DA, s. 7(5) and 7(3B) of the CLA and ss. 36(8) and 78 of the AA.

[29] The relevant provisions of the PCI DA and the AA are as follows:

Sections 4(1) of the PCIDA

Nothing done by any authorized officer for the purpose of executing this Act and the regulations made thereunder shall subject the authorized officer personally to any action, liability, claim or demand whatsoever.

Section 36(8) of the AA

No compensation shall be payable for any animal, bird or carcass destroyed or seized under this section.

Section 78 of the AA

(1) Any action taken under this Act or of any order, rule, or direction made or given under it in respect of any animal, bird, carcass, article, building or conveyance shall be at the risk of its owner.

(2) No liability shall attach to any Government or to any officer in respect of any expense, loss, damage or delay arising in or from the lawful exercise of the powers conferred by this Act.

[30] Section 78(1) and (2) of the AA provide protection by way of imposing at the owner's own risk and with no liability attached to the action taken by the Government or its officers under the AA. Such prohibition extends to allegations of delay in carrying out the action which was substantially the nature of he respondents' claim. Section 36(8) of the AA takes away the ight to compensation. See also s. 4(1) of the PCIDA. By heir provisions, it is clear policy that both PCIDA and the AA are to exclude liability and compensation.

[31] In the claim it was alleged that there was a failure or omission to use statutory duties imposed under PCIDA. This is incorrect as PCIDA does not impose any on the appellants but instead imposes on certain members of the public to do certain acts (see ss. 10, 12, 13 and 17 of the PCIDA). For example, s. 10(2) of the PCIDA imposes an obligation on medical practitioners to inform the existence of any infectious disease to the nearest Medical Officer of Health. Failure to do this act amounts to an offence. However, none of the above provisions impose an obligation on the appellants. The appellants' legal duty must either be imposed by statute or under common law. Since there is none under either, the action for breach of statutory duties is clearly frivolous and misconceived and must therefore be

struck out (see *X & Ors (minors) v. Bedfordshire County Council & Other appeals* [1995] 3 All ER 353 HL; *E v. K* [1995] 2 NZLR 239).

[32] Hence, these provisions under PCIDA and AA offer absolute protection to the appellants against the respondents' claim, especially since the orders made by the respective Menteri Besar have not been challenged. Thus, the reference to the House of Lords' case of *Arthur J S Hall v. Simons* [2000] 3 All ER 673 by the Court of Appeal for the proposition that "current English authority leaning against the grant of blanket immunity at the interlocutory stage results in issues of public interest being remitted to the trial stage" is misplaced as there is clear statutory prohibition of actions and claims against the appellants under the PCIDA and the AA.

[33] Further, I agree with the appellants that even without the above statutory protections, the law is also quite clear that the respondents' claim are unsustainable and therefore must be struck out *in limine*.

[34] The losses claimed in this action were occasioned by the disease be it of the JE or Nipah virus. The loss was not occasioned by the appellants at all. But it was alleged by the respondents that the losses suffered by them was caused by the delay on the part of the appellants in taking the necessary measures or due to the inefficiency of the appellants.

[35] However, delay in taking action or the exercise of any power is not actionable as the losses would have occurred in any event. In *The Administration of the Territory of Papua and New Guinea v. Leahy* [1960-1961] 105 CLR 6, the High Court of Australia dismissed an action brought to recover damages for cattle that had died from tick infection. The action was one under contract but even if made under tort the claim would still have been dismissed. At p 12 the High Court applied the principle in *East Suffolk Rivers Catchment Board v. Kent* [1941] AC 74 which said:

> ... where a statutory authority is entrusted with a power and exercises that power, *the only duty which it owes to a member of the public is not to add to the damages which that person would have suffered had the authority done nothing.* In that case the appellants, who were vested with statutory powers under the Land Drainage Act, 1930 (Imp.), undertook the repair of a sea wall but carried

> out the work inefficiently. The consequence was that the respondents' land was flooded for a longer period of time that it would have been if reasonable skill had been exercised. It was held that the appellants were under no liability to the respondents as the damage suffered by the latter was due to natural causes.
>
> In the present case the loss suffered by Leahy through the death of his cattle from red-water fever was due to tick infestation. The officers of the Administration exercised their powers for a period in a very inefficient manner through not carrying out the treatment properly. However, the cause of the loss was not the default of the Administration but a natural cause – the tick infestation – and therefore the respondent has not proved that the appellant has broken a duty of care leading to loss on his part. (emphasis added)

[36] Not too long ago attempts to impose a common law duty even in cases where there is statutory duty has consistently not found favour with the courts. In *Stovin v. Wise* [1996] AC 923 the House of Lords said at p 953:

> ... If the policy of the Act is not to create a statutory liability to pay compensation, the same policy should ordinarily exclude the existence of a common law duty of care.

[37] This principle was applied in *Gorringe v. Calderdate Metropolitan Borough Council* [2004] 2 All ER 326 where the House of Lords opined at p 336:

> [25] In the absence of a right to sue for breach of the statutory duty itself, **it would in my opinion have been absurd to hold that the council was nevertheless under a common law duty to take reasonable care** to provide accommodation for homeless persons whom it could reasonably foresee would otherwise be reduced to sleeping rough. And the argument would in my opinion have been even weaker if the council, instead of being under a duty to provide accommodation, merely had power to do so. (emphasis added)

[38] In *Capital and Counties plc v. Hampshire County Council & Ors* [1997] 2 All ER 865 the English Court of Appeal reiterated the principle in *Gorringe, supra,* when it heard jointly three appeals concerning delay in action on the part of the fire fighting authorities. The claims were struck out on the ground of no cause of action. On appeal, the Court of Appeal affirmed the decision and applied *East Suffolk Rivers, supra* and ruled at p 878:

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> In our judgment the fire brigade are not under a common law duty to answer the call for help and are not under a duty to take care to do so. If therefore they fail to turn up or fail to turn up in time because they have carelessly misunderstood the message, got lost on the way or run into a tree, they are not liable.

B

[39] Thus, having regard to the foregoing reasons, the Court of Appeal was erroneous in concluding that this case was inappropriate to be summarily struck out. The respondents' case was so untenable and doomed to failure both on the facts and the law. The striking out order of the respondents' action under

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O. 18 r. 19(1) of the RHC on the grounds advanced by the appellants was therefore correct.

[40] Hence, my answers to Questions (3) and (5) are in the positive and negative respectively.

D

Conclusion

[41] All the five questions of law have been answered. Accordingly, I allow the appeal with costs. The orders of the Court of Appeal are hereby set aside. The orders of the SAR and

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the High Court are restored and affirmed.

[42] My learned brother Arifin Zakaria Chief Judge (Malaya) and my learned brother Zulkefli FCJ have read this judgment in draft and have expressed their agreement with it.

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